

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IRACING.COM MOTORSPORT SIMULATIONS, LLC, a Delaware Limited Liability Company,	X	Civil Action No.
	:	05-11639 NG
Plaintiff,	:	
	:	
v.	:	PLAINTIFF'S
	:	MOTION FOR DETAILED
TIM ROBINSON, individually and d/b/a	:	PRE-TRIAL SCHEDULING
www.ow-racing.com, www.torn8oalley.com and	:	<u>ORDER AND TO COMPEL</u>
www.First-Racing-Sucks.com,	:	
	:	
Defendant.	:	
	X	

Plaintiff iRacing.com Motorsport Simulations, LLC ("iRacing") respectfully moves this Court to enter an Order establishing a more detailed pre-trial schedule and presentation of evidence as discussed below and compelling Defendant Tim Robinson ("Robinson") to produce disclosures required by Fed. R. Civ. P. 26(a)(3).

I. The Court Should Order Cases In Chief By Affidavit

At a status conference held on December 15, 2008, iRacing proposed that the Court accept direct evidence at trial by affidavit subject to cross examination. Under this format, the parties would submit their direct examination of witnesses in advance in affidavit form. At trial, witnesses would be subject to live cross-examination. The Court indicated that it would be open to this procedure and urged the parties to reach a stipulated agreement to it.

As promised in Chambers, counsel for iRacing wrote to Robinson's counsel on December 15, 2008, enclosing a copy of Judge Keeton's scheduling order in connection with such "trials by affidavit" and proposing such a schedule based on Judge Keeton's

procedural order. (Aff. of Irwin B. Schwartz in Supp. of Pl.'s Mot. for Trial by Aff. and to Compel ("Schwartz Aff.") ¶ 2). The proposed scheduling order is as follows:

<u>Event</u>	<u>Deadline Under Keeton Order</u>	<u>iRacing Proposed Deadline</u>
Rule 26(a)(3) Pre-trial disclosures		December 22, 2008 (existing)
Meet-and-Confer for Joint Pre-trial Memo		January 6, 2009 (existing)
Initial Proposed Findings of Fact & Conclusions of Law From Party With Burden of Proof	January 29, 2009 (¶ 2) (served but not filed)	January 6, 2009
Joint Pre-trial Memo filed		January 14, 2009 (existing)
Marked Response To Initial Proposed Findings Of Fact And Conclusions Of Law	February 2, 2009 (¶ 3(a)) (served and filed)	January 14, 2009
[Optional] Proposed Additional or Substitute Findings & Conclusions From Party Not Bearing The Burden Of Proof	February 2, 2009 (¶ 3(b)) (served but not filed)	January 14, 2009
Final pre-trial conference		January 21, 2009 (set by Judge Gertner)
Trial Brief		January 29, 2009 (existing)
Marked Response to Proposed Additional or Substitute Findings and Conclusions	February 3, 2009 (¶ 3(c)) (served and filed)	January 29, 2009
Notice of non-consent to affidavits in lieu of direct testimony by motion	February 2, 2009 (¶ 4)	January 29, 2009
List of witnesses, together with the affidavits of each witness whose direct testimony is to be received by affidavit	February 3, 2009 (¶ 5(a))	February 2, 2009
List of depositions to be used at trial in party's case in chief, identifying pages or portions to be used (need not include transcript to be used for impeachment or cross examination)	February 3, 2009 (¶ 5(b))	February 2, 2009

List of exhibits to be introduced without objection	February 3, 2009 (¶ 5 (c))	February 3, 2009
List of exhibits to be introduced at trial as to which a party has reserved the right to object	February 3, 2009 (¶ 5(d))	February 3, 2009
Notice of intent to cross examine witnesses whose affidavit has been filed under paragraph 5(a)	February 4, 2009 (¶ 6)	February 4, 2009

To date, iRacing's counsel has received no response from Robinson's counsel.
(Schwartz Aff. ¶ 3).

Given no jury will be empanelled for this case and most of the factual issues have already been determined by the Court, iRacing respectfully suggests that the above-referenced schedule will force the parties to further distill the evidence and limit the time required for trial to a bare minimum and thus requests that the Court enter a scheduling order as set forth above.

II. Robinson Must Produce Rule 26(a)(3) Pre-Trial Disclosures

Pursuant to Fed. R. Civ. P. 26(a)(3) each party must make pretrial disclosures identifying: (1) anticipated witnesses to be used at trial; (2) the witnesses whose testimony will be by deposition; and (3) each document and exhibit that the party expects to offer as evidence at trial. Moreover, these disclosures must be provided to the opposing party no later than 30 days before the pretrial conference. Local Rule 16.5.

In this case, the pretrial conference is scheduled for January 21, 2009.
(Electronic Notice of Hearing (Sept. 26, 2008)). As such, Robinson was required to

produce his pretrial disclosures by December 22, 2008. However, Robinson failed to produce any Rule 26(a)(3) disclosures at all. (Schwartz Aff. ¶ 4). Accordingly, this Court should enter an order compelling Robinson to provide the required disclosures by no later than January 5, 2009 or prevent Robinson from introducing undisclosed witnesses or documentary evidence at trial.

DATED: December 30, 2008

Respectfully submitted,

iRacing.com Motorsport Simulations, LLC
By its attorneys,

/s/ Irwin B. Schwartz
Irwin B. Schwartz (BBO# 548763)
Michael G. Andrews (BBO# 663452)
Business Litigation Associates, P.C.
225 Franklin Street, 26th Floor
Boston, Massachusetts 02110
(617) 421-1800

Certification Under Local Rule 7.1(a)(2)

I, Irwin B. Schwartz, attorney for Plaintiff iRacing.com Motorsport Simulations, LLC, hereby certify that I complied with Local Rule 7.1 in that I attempted to confer with defendant's counsel by electronic mail and U.S. mail on December 15, 2008, in a good faith attempt to narrow and/or resolve the scheduling issues addressed in this motion. The conference did not result in defendant's assent to this motion.

/s/ Irwin B. Schwartz
Irwin B. Schwartz

Certificate of Service

I, Irwin B. Schwartz, attorney for Plaintiff iRacing.com Motorsport Simulations, LLC, hereby certify that on this 30th day of December 2008, I filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to: Joseph F. Ryan, Lyne Woodworth & Evarts LLP, 12 Post Office Square, Boston, MA 02109, counsel for Defendant Tim Robinson.

/s/ Irwin B. Schwartz
Irwin B. Schwartz